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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

JUN 14 2017
PUBLIC SERVICE
COMMISSION

In the Matter of:

BIG RIVERS ELECTRIC CORPORATION'S)
FILING OF WHOLESALE CONTRACTS) Case No. 2017-_____
AMENDMENTS PURSUANT TO KRS 278.160,)
278.180, AND 807 KAR 5:011 § 13)

**PETITION OF BIG RIVERS ELECTRIC CORPORATION FOR CONFIDENTIAL
PROTECTION**

1. Big Rivers Electric Corporation ("Big Rivers") hereby petitions the Kentucky Public Service Commission ("Commission"), pursuant to 807 KAR 5:001 Section 13, KRS 61.878(1)(c), and KRS 278.160(3), to grant confidential protection to portions of three contract amendments (the "Amendments") and a summary of each of the Amendments (the "Summaries") that Big Rivers is filing with this petition. The information Big Rivers seeks to protect as confidential is hereinafter referred to as the "Confidential Information."

2. The Amendments relate to three special contracts that the Commission approved in *In the Matter of: Big Rivers Electric Corporation Filing of Wholesale Contracts Pursuant to KRS 278.180 and KAR 5:001 § 13*, P.S.C. Case No. 2014-00134. In its July 21, 2015, order in that case, the Commission granted its approval of: (1) a Market Based Rate Partial and Full Requirements Agreement, dated as of December 20, 2013, by and among Big Rivers and Northeast Nebraska Public Power District; (2) a Market Based Partial and Full Requirements Agreement, dated as of December 20, 2013, by and among Big Rivers and city of Wayne, Nebraska; and (3) a Market Based Partial and Full Requirements Agreement, dated as of December 20, 2013, by and among Big Rivers and city of Wakefield, Nebraska (collectively "Nebraska PPAs"). Each of the Amendments amends one of the Nebraska PPAs.

1 3. One (1) sealed copy of the pages of the Amendments and the Summaries
2 containing Confidential Information, with the Confidential Information highlighted with
3 transparent ink, printed on yellow paper, or otherwise marked "CONFIDENTIAL," is being filed
4 with this petition. An original and ten (10) copies of the pages containing Confidential
5 Information, with the Confidential Information redacted, are also being filed with this petition.
6 807 KAR 5:001 Sections 13(2)(a)(3).

7 4. There are currently no other parties to this proceeding on which copies of this
8 petition must be served. 807 KAR 5:001 Section 13(2)(b).

9 5. If and to the extent the Confidential Information becomes generally available to
10 the public, whether through filings required by other agencies or otherwise, Big Rivers will
11 notify the Commission and have its confidential status removed. 807 KAR 5:001 Section
12 13(10)(b).

13 6. As discussed below, the Confidential Information is entitled to confidential
14 protection based upon KRS 61.878(1)(c)(1), which protects "records confidentially disclosed to
15 an agency or required by an agency to be disclosed to it, generally recognized as confidential or
16 proprietary, which if openly disclosed would permit an unfair commercial advantage to
17 competitors of the entity that disclosed the records." KRS 61.878(1)(c)(1); 807 KAR 5:001
18 Section 13(2)(a)(1). Section I below explains that Big Rivers operates in competitive
19 environments in the wholesale power market and in the credit market. Section II below shows
20 that the Confidential Information is generally recognized as confidential or proprietary. Section
21 III below demonstrates that public disclosure of the Confidential Information would permit an
22 unfair commercial advantage to Big Rivers' competitors.
23

I. Big Rivers' Faces Actual Competition

7. As a generation and transmission cooperative, Big Rivers competes in the wholesale power market. This includes not only the short-term bilateral energy market, the day-ahead and real time energy and ancillary services markets, and the capacity market to which Big Rivers has access by virtue of its membership in Midcontinent Independent System Operator, Inc. ("MISO"), but also forward bilateral long-term agreements and wholesale agreements with utilities and industrial customers. Big Rivers' ability to successfully compete in the market is dependent upon a combination of its ability to: 1) obtain the maximum price for the power it sells, and 2) keep its cost of production as low as possible. Fundamentally, if Big Rivers' cost of producing a unit of power increases, its ability to sell that unit in competition with other utilities is adversely affected.

8. Big Rivers also competes for reasonably priced credit in the credit markets, and its ability to compete is directly impacted by its financial results. Lower revenues and any events that adversely affect Big Rivers' margins will adversely affect its financial results and potentially impact the price it pays for credit. A competitor armed with Big Rivers' proprietary and confidential information will be able to increase Big Rivers' costs or decrease Big Rivers' revenues, which could in turn affect Big Rivers' apparent creditworthiness. A utility the size of Big Rivers that operates generation and transmission facilities will always have periodic cash and borrowing requirements for both anticipated and unanticipated needs. Big Rivers expects to be in the credit markets on a regular basis in the future, and it is imperative that Big Rivers improve and maintain its credit profile.

9. Accordingly, Big Rivers has competitors in both the power and capital markets, and its Confidential Information should be protected to prevent the imposition of an unfair competitive advantage.

1 **II. The Confidential Information is Generally Recognized as Confidential or**
2 **Proprietary**

10. The Confidential Information for which Big Rivers seeks confidential treatment under KRS 61.878(1)(c)(1) is generally recognized as confidential or proprietary under Kentucky law.

11. The Confidential Information consists of the confidential, negotiated terms of the Amendments. KRS 278.160(3) specifically recognizes that terms of a special contract are not required to be publicly disclosed if such terms are entitled to protection under KRS 61.878(1)(c)(1), and the Commission has previously granted confidential treatment to similar information. *See, e.g., In the Matter of: Application of Big Rivers Electric Corporation for a General Adjustment in Rates*, Order, P.S.C. Case No. 2012-0535 (April 25, 2013) (granting confidential treatment to details of sensitive commercial negotiations). In fact, the Confidential Information in the Amendments amend confidential terms from the Nebraska PPAs for which the Commission granted confidential treatment by order dated September 10, 2014, in P.S.C. Case No. 2014-00134. The Confidential Information in the Summaries consists of summaries of the confidential terms in the Amendments and the Nebraska PPAs.

12. The Confidential Information is not publicly available, is not disseminated within Big Rivers except to those employees and professionals with a legitimate business need to know and act upon the information, and is not disseminated to others without a legitimate need to know and act upon the information. As such, the Confidential Information is generally recognized as confidential and proprietary.

22 **III. Disclosure of the Confidential Information Would Permit an Unfair Commercial**
 23 **Advantage to Big Rivers' Competitors**

13. Public disclosure of the Confidential Information would permit an unfair commercial advantage to Big Rivers' competitors. As discussed above, Big Rivers faces actual

1 competition in both the short- and long-term wholesale power markets and in the credit markets.
2 It is likely that Big Rivers' ability to compete in these markets would be adversely affected if the
3 Confidential Information was publicly disclosed, and Big Rivers seeks protection from such
4 competitive injury.

5 14. In P.S.C. Case No. 2003-00054, the Commission granted confidential protection
6 for bids submitted to Union Light Heat & Power ("ULH&P"). ULH&P's argued, and the
7 Commission implicitly accepted, that the bidding contractors would not want their bid
8 information publicly disclosed, and that disclosure would reduce the contractor pool available to
9 ULH&P, which would drive up ULH&P's costs, hurting its ability to compete with other gas
10 suppliers. *In the Matter of: Application of the Union Light, Heat and Power Company for*
11 *Confidential Treatment*, Order, P.S.C. Case No. 2003-00054 (August 4, 2003). Similarly, in *Hoy*
12 *v. Kentucky Indus. Revitalization Authority*, the Kentucky Supreme Court found that without
13 protection for confidential information provided to a public agency, "companies would be
14 reluctant to apply for investment tax credits for fear the confidentiality of financial information
15 would be compromised. *Hoy v. Kentucky Indus. Revitalization Authority*, 907 S.W.2d 766, 769
16 (Ky. 1995).

17 15. In Big Rivers' case, Big Rivers is currently in negotiations with potential
18 counterparties interested in purchasing wholesale power from Big Rivers, and Big Rivers expects
19 to engage in negotiations with other counterparties in the future. If confidential treatment of the
20 confidential terms of the Amendments is denied, potential counterparties would know that the
21 confidential terms of their contracts would be publicly disclosed, which could reveal information
22 to their competitors about their competitiveness. Because many companies would be reluctant to
23 have such information disclosed, public disclosure of the Confidential Information in this case

1 would likely reduce the pool of counterparties willing to negotiate with Big Rivers, reducing Big
2 Rivers' ability to sell power and impairing its ability to compete in the wholesale power and
3 credit markets.

4 16. Additionally, in P.S.C. Case No. 2003-00054, the Commission granted
5 confidential protection to bids submitted to ULH&P. In addition to the other arguments
6 discussed above, ULH&P argued, and the Commission implicitly accepted, that if the bids it
7 received were publicly disclosed, contractors on future work could use the bids as a benchmark,
8 which would likely lead to the submission of higher bids. *In the Matter of: Application of the*
9 *Union Light, Heat and Power Company for Confidential Treatment*, Order, P.S.C. Case No.
10 2003-00054 (August 4, 2003). The Commission also implicitly accepted ULH&P's further
11 argument that the higher bids would lessen ULH&P's ability to compete with other gas
12 suppliers. *Id.* Similarly, public disclosure of the confidential terms of the Amendments and the
13 Summaries would allow potential counterparties to future agreements with Big Rivers to use the
14 terms as a benchmark for negotiations, leading to less favorable prices and terms for power sales
15 for Big Rivers and placing Big Rivers at an unfair competitive disadvantage in the wholesale
16 power and credit markets.

17 17. Public disclosure of the Confidential Information will also impair Big Rivers'
18 ability to enter into future wholesale power sales because other wholesale suppliers, who are
19 competitors to Big Rivers, will have detailed knowledge of the terms upon which Big Rivers has
20 previously entered into wholesale power sales agreements. These competitors would then be
21 able to tailor their bids or proposals, which will give them an unfair competitive advantage in
22 competing with Big Rivers to be the wholesale supplier.

18. Thus, Big Rivers' competitiveness will be adversely affected if other suppliers are given such an unfair competitive advantage or if potential counterparties are given a negotiating advantage. Accordingly, the public disclosure of the information that Big Rivers seeks to protect pursuant to KRS 61.878(1)(c)(1) would provide Big Rivers' competitors with an unfair commercial advantage.

IV. Time Period

19. Big Rivers requests that the Confidential Information remain confidential indefinitely because so long as Big Rivers is in the wholesale power market, the public disclosure of the confidential terms of the Amendments and the Summaries that it has agreed to could be used to Big Rivers' competitive disadvantage for the reasons stated above. 807 KAR 5:001 Section 13(2)(a)(2).

V. Conclusion

20. Based on the foregoing, the Confidential Information is entitled to confidential protection. If the Commission disagrees that Big Rivers is entitled to confidential protection, due process requires the Commission to hold an evidentiary hearing. *See Utility Regulatory Com'n v. Kentucky Water Service Co., Inc.*, 642 S.W.2d 591 (Ky. App. 1982).

WHEREFORE, Big Rivers respectfully requests that the Commission classify and protect as confidential the Confidential Information.

1 On this the 13 day of June, 2017.

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4 _____
5 James M. Miller
6 Tyson Kamuf
7 SULLIVAN, MOUNTJOY, STAINBACK
8 & MILLER, P.S.C.
9 100 St. Ann Street
10 P. O. Box 727
11 Owensboro, Kentucky 42302-0727
12 Phone: (270) 926-4000
13 Facsimile: (270) 683-6694
14 jmillersmsmlaw.com
15 tkamuf@smsmlaw.com
16

Counsel for Big Rivers Electric Corporation